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Civil liability for cyber bullying in schools: A new challenge for psychologists, schools and lawyers

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Abstract

Despite the implementation of various intervention strategies, bullying remains a common occurrence in Australian schools. Technology has now provided an insidious new weapon for bullies, who are now able to reach their target any time of the day and anywhere, including the previous safe haven of home. The internet also means an expanded audience for the bullying behaviour. However, there is a growing number of cases of the target of bullying seeking reparation for the harm he or she has suffered by taking legal action against the perpetrator for the behaviour, or the school for an alleged failure to prevent such behaviour. Cases involving traditional forms of bullying are apt to involve difficult issues for the law to resolve; cyber bullying will only increase this challenge. These difficulties are likely to be shared by consulting psychologists and psychiatrists who may be called on in evidence to distort their medical opinions in order to conform to legal formulations of the limits of liability which may, in some cases, have questionable medical validity. This paper considers the various limits on legal liability that would be applied when determining of a child against a school for the alleged failure to prevent cyber bullying and highlights those areas which may be problematic for schools, the law and/or consulting psychologists/ psychiatrists.

Introduction

Cyber bullying is a term coined by Canadian Bill Belsey to mean bullying using technology such as the internet websites or mobile phones (Belsey, n.d.). Technology has added a new dimension to the bullying phenomenon. Cyber bullying, unlike traditional face-to-face bullying has the capacity to reach the target 24 hours a day, 7 days a week, anywhere the target might be. Not even the home now offers a safe haven from aggressors. Further, the internet means that the audience of such bullying may now be anywhere in the world. In addition, the only harm inflicted by a cyber bully will be in the nature of psychological injury, with no element of the physical damage often caused by face-to-face bullying. Such psychological harm may be no less destructive. Indeed, there are instances where cyber bullying has been linked with the suicide of the target of the behaviour (Marshall, 2005).

Increasingly, targets who may feel powerless in the face of bullying behaviour are turning to the courts to exact some measure of reparation from those responsible. When the cyber bullying takes place in a school context, the target of the behaviour (the "plaintiff" in any legal action) may seek to obtain compensation against either the perpetrator or the school authorities who failed to take steps to prevent it (the "defendants" in any action). In the case of the perpetrator, depending on circumstances, such an action might be framed as action for the tort of "assault"[1], an intentional infliction of psychiatric harm, defamation or the embryonic tort protecting privacy. Unlike criminal law, age is no barrier to a civil liability to pay compensation for cyber bullying. The only question is whether the perpetrator "was old enough to know that his [or her] conduct was wrongful - that is to say if, in the common phrase, he [or she] was old enough to know better" (*McHale v Watson* (1964) 111 CLR 364). The decision whether to bring an action against a child perpetrator is therefore more likely to involve more practical considerations such as whether he or she has sufficient financial resources to make him or her worth suing. Whatever the position in other countries, under Australian law parents are generally not legally liable for the acts of their children (*Smith v Leurs* (1945) 70 CLR 256).

By contrast, the school authority – which in case of a public school will usually be a State or Territory government and in the case of a private school will normally be an organisation such as an incorporated company, a church diocese or trust – may be perceived to be a more attractive target for litigation since it will likely have greater resources to meet any compensation award, whether through insurance or the backing of government finances. However, depending on bthe circumstances, the only causes of action that may be available for cyber bullying by a fellow student may be limited to defamation and negligence.

Defamation

Cyber bullying may sometimes consist of uploading words or images onto internet web sites, chat rooms, bulletin boards, blogs or wikis which humiliate, embarrass or otherwise cause distress to the target. Under the uniform defamation legislation recently

[1] Assault is both a tort and a crime.

enacted by all jurisdictions in Australia (*Civil Laws (Wrongs) Act 2002* (ACT), Chap 9; *Defamation Act 2005* (NSW); *Defamation Act* (NT); *Defamation Act 2005* (Qld); *Defamation Act 2005* (SA); *Defamation Act 2005* (Tas); *Defamation Act 2005* (Vic); *Defamation Act 2005* (WA)) the common law is now to be applied when determining whether defamation has been established. The publication need not refer to the plaintiff by name but may consist of a photograph, drawing or other image or otherwise which may be reasonably understood as identifying the plaintiff. To be regarded as defamatory the publication needs to (1) expose the plaintiff to hatred, contempt or ridicule; (2) induces others to shun or avoid the plaintiff; or (3) lowers the plaintiff in the estimation of others whilst disparaging the plaintiff in the sense of attributing moral blame to the plaintiff for some disagreeable conduct or attribute. It is important to recognise that the motive or actual intention of the defendant is irrelevant. It is no defence that the publication was only meant in jest or fun (*Donoghue v Hayes* (1831) Exch 265). It is the interpretation of a reasonable reader/viewer of the publication that is taken into account (*Hepburn v TCN Channel Nine Pty Ltd* [1983] 2 NSWLR 664).

The significance for a school authority lies in the longstanding authority that a defendant who knowingly allows a defamatory material to remain on his or her notice board will be held to be as much responsible for the defamation as the person who posted it (*Byrne v Deane* [1937] 1 KB 818). This has been extended to computer sites where the host of the site has editorial control (*Stratton Oakmont Inc v Prodigy Services Inc* 1995 NY Misc LEXIS 229; compare *Cubby Inc v CompuServe Inc* 776 F Supp 135 (SDNY) (1991)). Accordingly, school authorities which exercise editorial control over the sites they hosts, must act promptly upon becoming aware of potentially defamatory material having been posted on the site to ensure that the offending material is taken down, or risk being held as accountable for that material as the person who actually posted it.

Negligence

There are a growing number of claims being made by students against their schools for failure to prevent bullying. For example, a Victorian school girl was awarded $75,000 in 2003 for her school's failure to prevent a prolonged campaign of harassment (Butcher, 2003), a bullied student reached an out of court settlement with a private school in Victoria for $400,000 in 2007 (Ross, 2007) and a former student was awarded an estimated $1.5 million in the New South Wales Supreme Court for his school's failure to prevent bullying which caused psychiatric disorders which have left him unemployable for life (*Cox v New South Wales* [2007] NSWSC 471). However, there is yet to be a case based on any form of cyberbullying. Several cases of face-to-face bullying have raised issues which the courts have found difficult to resolve. It is likely that cyber bullying will pose further challenges.

A plaintiff seeking to establish an action for negligence is required to show that the defendant owed the plaintiff a duty of care, and that the defendant's breach of that duty caused the plaintiff to suffer damage. If the action is made out the defendant may seek to rely on a defence, which in the case of cyber bullying in a school context is likely to be limited to contributory negligence by the target.

Duty of care

It is well established that at common law a school authority owes a duty of care towards its students (*Commonwealth v Introvigne* (1982) 150 CLR 258). The duty is described as being "non-delegable". This means that even where, as is usually the case, the practical responsibility for ensuring that the school is a safe environment is delegated to the principal of the school, the *legal* responsibility at all times remains with the school authority. Consequently, it will be the school authority which will bear any legal liability in the event that the duty is breached. This duty has been recognised as extending to protecting the student from the conduct of other students (*New South Wales v Lepore* (2003) 212 CLR 511).

While the existence of the duty may be without doubt, more problematic may be the *scope* of the duty in terms of geography and time. In Australia it has been held that the existence of the duty depends upon "whether in the particular circumstances the relationship of school teacher and pupil was or was not been in existence" (*Geyer v Downs* (1977) 138 CLR 91). The test therefore does not depend upon whether the student is on school premises or whether any accident occurs during school hours.

There have been cases which have held at the duty has been owed despite the incident resulting in injury occurring outside school hours and beyond on school premises. In *Trustees of the Roman Catholic Church for the Diocese of Bathurst v Koffman* (1996) Aust Torts Reports 81-399 a 12 year old school boy injured in an incident involving older students successfully sued his school for breach of duty despite the incident occurring 20 minutes after the end of the school day and 400 metres from school grounds. Shellar JA went so far as to say that, depending on the circumstances, the duty could extend to pupils bullied on the journey on the bus or while they were walking to or from school. Such principles will be of relevance in the as yet untested case of liability for cyber bullying.

There will be no doubt that the scope of a school's duty will embrace bullying via a website, blog or wiki hosted on a school server during school hours using school computers. However, the duty is likely to extend further. It is also likely to catch contributions to a school-hosted website, blog, or wiki which is accessed remotely by a student, perhaps from home or some other location away from school premises. This extension would be based on factors such as the school's control over the hosting sever and its grant of remote access to a student user under instructions or conditions of use which may be regarded indicia that the relationship of teacher and pupil is in existence in the circumstances, notwithstanding the time or place the website, blog, or wiki is being accessed. Arguably the duty should also be seen as extending to students using school computers on school premises, whether during school hours or not, to access sites hosted on third party servers (such as a myspace profile or the like) since again there will presumably be rules or instructions relating to use of these computers which may be sufficient to establish that in the circumstances the necessary relationship of teacher and pupil existed at that time. However, instances of cyber bullying occurring at a time when the relationship of teacher and pupil is not in existence must necessarily be the concern of parents or, if need be, the police. The mere fact that the bully and his or her target attend the same school will not be sufficient to bring such a case within the purview of the school authority's duty of care.

Normal fortitude

As already noted, cyberbullying may result in psychological damage only. The law has recognised a right to recover for psychiatric injury for over 100 years. Nevertheless, the precise limits of liability has been a question that has long a vexed the courts. Despite recent High Court authority which has settled most aspects of the relevant law in Australia (*Tame v New South Wales* (2002) 211 CLR 317) an issue that continues to be problematic springs from the common understanding in the community that different people have different resilience to stressors that may trigger psychological damage (Waller J in *Chadwick v British Railways Board* [1967] 1WLR 912 at 922). There may be fears, therefore, that a defendant could be held responsible in cases involving a mere upset suffered by someone who might be considered overly sensitive.

Two approaches have emerged to this question. In all Australian jurisdictions except Queensland and the Northern Territory legislation now provides that there is no duty of care not to cause pure mental harm (described in the legislation as "recognised psychiatric illness") unless, absent knowledge of particular susceptibility, the defendant ought to have foreseen that a person of normal fortitude might suffer psychiatric illness if care was not taken in the circumstances: see *Civil Law (Wrongs) Act 2002* (ACT), s 34; *Civil Liability Act 2002* (NSW), s 32; *Civil Liability Act 1936* (SA), s 33; *Civil Liability Act 2002* (Tas), s 34; *Wrongs Act 1958* (Vic), s 72; *Civil Liability Act 2002* (WA), s 5S. This legislation was intended to give effect to the High Court decision in *Tame v New South Wales Wales* (2002) 211 CLR 317 (Ipp 2003) but in fact gives effect to the views of only two of the five judges in that case, McHugh and Callinan JJ.

As a result a plaintiff student who suffers psychiatric harm resulting from cyberbullying in an Australian jurisdiction other than Queensland or the Northern Territory must prove, as part of his or her case, that he or she is a child of "normal fortitude". Naturally there will be some cases which most people may regard as clearly extreme or not extreme. There will be other cases which are much more borderline. Every person has his or her own breaking point to external stressors, which depends upon *inter alia* individual factors such as age, health, personality type and previous experiences: there is no medical legitimacy to the concept of "normality" in the general community (Herman, 1992; Tomb, 1994; Yehuda, 1998). When the task is reframed in terms of a "normal child," it becomes an even greater challenge.

Courts are therefore left to make their own intuitive decisions, but are likely to want to inform that decision by reference to the expert evidence of psychiatrists or psychologists. Even among such experts views may differ regarding the level of aggressive interaction that may be accepted as beneficial to the healthy development of a child into an adult who is able to cope with the pressures and demands associated with living in a modern society. The question will remain: how much aggression should a "normal child" be expected to endure before it is regarded as amounting to damaging bullying? In such cases, a consulting psychologist or psychiatrist may therefore find that he or she is required to recast the relevant frame of reference from the best course of treatment for the individual under his or her care to giving advice which conforms to a legal formulation of dubious medical legitimacy.

The approach in Queensland and the Northern Territory reflects the common law as stated by the majority of the judges in *Tame v New South Wales* (2002) 211 CLR 317. Under this approach, the defendant will owe a duty of care unless the plaintiff's reaction to the bullying is beyond the bounds of reasonable foreseeability. This will likely only be in an extreme case, of a kind on which most would agree. As such, it is much less likely to require a psychologist or psychiatrist to deal with the fictions invented by lawyers.

Accordingly, in most Australian jurisdictions the "normal fortitude" requirement may pose a significant hurdle for a plaintiff in a borderline case, which will be a significant test for lawyer and psychiatrist/ psychologist alike.

Standard of care

In the past the duty of a school teacher has been expressed as "such care … as a careful father would take of his boys" (Lord Esher in *Williams v Eady* (1893) 10 TLR 41). However, this has been criticised as unrealistic for a principal in charge of a large number of students and in a time of teachers having tertiary qualifications (*Geyer v Downs* (1977) 138 CLR 91). Today the duty is expressed as being the care that would be exercised by a reasonable teacher or school. This in turn involves two questions: (1) was the risk of injury was reasonably foreseeable in the circumstances, in the sense that the risk was "not insignificant"? and (2) what precautions (if any) would a reasonable person have taken to avoid that risk in the circumstances – taking into account the probability that harm would occur absent care, the likely seriousness of that harm, the burden of taking precautions, and the social utility of the risk-creating activity (*Civil Law (Wrongs) Act 2002* (ACT), s 42-43; *Civil Liability Act 2002* (NSW), s 5B; *Civil Liability Act 2003* (Qld), s 9; *Civil Liability Act 1936* (SA), ss 31-32; *Civil Liability Act 2002* (Tas), s 11; *Wrongs Act 1958* (Vic), s 48; *Civil Liability Act 2002* (WA), s 5B). Further, in many jurisdictions when deciding what would be a reasonable response to a risk, the court is to defer to a "responsible body" of expert opinion "unless no reasonable court would do so" (*Civil Liability Act 2002* (NSW), s 5O; *Civil Liability Act 2003* (Qld), s 22; *Civil Liability Act 1936* (SA), s 41; *Civil Liability Act 2002* (Tas), s 22; *Wrongs Act 1958* (Vic), s 59. Cf *Civil Liability Act 2002* (WA), s 5PB which only applies to medical professionals).

Accordingly in many States the accepted practices in the teaching profession will, unless judged unreasonable, be the best guide to what should have been the response of a reasonable school authority or teacher. For example, it might be reasonable to expect supervision and monitoring of the use of computer equipment for those cases where the target and perpetrator are both on the premises of the school authority. An additional precaution that may be expected may be for the school to monitor and exercise prudent editorial control over any web sites, blogs, wikis or the like that are hosted on the school's server. Whether schools should go so far as banning the use of mobile phones on school property may not yet be regarded as an "accepted practice". This may be a matter that, if not already accepted, may be recognised in due time. Its recognition as a matter informing the relevant standard of care in the circumstances will therefore depend upon whether there is evidence that a sufficient number of schools are pursuing such a policy so as to make it an "accepted practice".

In all cases it would also be important to have an anti-bullying policy which expressly extended to cyber bullying, and for that policy to be put into practice including repeated reminders. Such policies could extend to the time the relevant relationship is in existence, whether on school premises or not. School-hosted sites may need to be routinely monitored for potentially deleterious content, although this cannot be expected to be a complete panacea since there may be content, such as obscure terminology or abbreviated communications, which may not be reasonably understood to constitute cyber bullying without a full understanding of context. Alternatively, the cyber bullying may take subtle forms such as deliberate exclusion from the community manifested by, for example, a refusal to acknowledge contributions to a discussion forum, blog or wiki. Such bullying may be impossible to detect without a proper understanding of the context. In addition, it is important complaints about bullying be taken seriously and investigated properly by those charged with that responsibility, normally principals or deputy principals (cf *Cox v New South Wales* [2007] NSWSC 471).

If remedial action is required then it must be taken and applied in a consistent fashion so that potential bullies do not think that such a policy might be the zero tolerance in name only. It is also important to encourage a culture in which bystanders do not stand idly by whilst bullying, including cyber bullying, takes place and should at least have an avenue for the reporting of instances of this misbehaviour.

Causation

Causation is often a counterpoint between law and medicine since the term has different meanings in the different disciplines. In Australia, the law requires that the child plaintiff show that any injury would not have been suffered "but for" the school's particular breach of duty (*Civil Law (Wrongs) Act 2002* (ACT), s 45; *Civil Liability Act 2002* (NSW), s 5D; *Civil Liability Act 2003* (Qld), s 11; *Civil Liability Act 1936* (SA), s 34; *Civil Liability Act 2002* (Tas), s 13; *Wrongs Act 1958* (Vic), s 51; *Civil Liability Act 2002* (WA), s 5C). Thus, it would be insufficient to merely identify a breach of duty by the school such as a failure to supervise if the failure to supervise did not materially contribute to the injury.

An additional issue concerning causation which will constitute a significant challenge for lawyers and psychologists/psychiatrists is that some of the common symptoms of cyber bullying might reasonably be

expected to be displayed by an adolescent as a result of a variety of causes, including simply those associated with growing up, rather than any bullying behaviour. There may be a tendency, conscious or subconscious, for the child plaintiff or his or her family to attribute all ailments of a psychological or psychosomatic nature to the cyber bullying. This will include cases where the child is situated within a family which is otherwise beset by depression, such that he or she may even be genetically predisposed to depression or other psychological disorders (*Cox v New South Wales* [2007] NSWSC 471) or where the child's family consciously or subconsciously encourages him or her to adopt a "sick role" in the hope of attracting monetary compensation (*Nader v Urban Transit Authority of New South Wales* (1985) 2 NSWLR 501).

Accordingly, distinguishing between psychological or psychosomatic injuries linked to the breach of duty and those resulting from other causes will be an important threshold task (*Bradford-Smart v West Sussex County Council* [2002] ELR 139 (CA)). It will be sufficient, however, if the plaintiff is able to show that the school's failure to prevent the cyber bullying in breach of its duty of care was one of the material causes of the resulting psychological harm as opposed to, for example, the sole or dominant cause.

Contributory negligence

If a school is to have any defence it will lie in contributory negligence. In six States a plaintiff's contributory negligence is now to be based on the same approach to a defendant's negligence, that is reasonable foreseeability of risk and the precautions a reasonable person would take (if any) to that risk, taking into account the same kinds of factors that determine a defendant's standard of care (*Civil Liability Act 2002* (NSW), s 5R; *Civil Liability Act 2003* (Qld), s 23; *Civil Liability Act 1936* (SA), s 44; *Civil Liability Act 2002* (Tas), s 23; *Wrongs Act 1958* (Vic), s 62; *Civil Liability Act 2002* (WA), s 5K). Once again, this will require a determination of what the reaction of a "reasonable child" would have been in the circumstances, including what precautions such a mythical child would have taken for his or her own safety.

Superficially, practical precautions by a plaintiff to prevent being injured by bullying normally might include reporting the bullying to the relevant authority and perhaps seeking professional assistance to address psychiatric symptoms. However, there may be some difficulty establishing contributory negligence in the case of a student who had been cyber bullied inasmuch as children will normally have a reduced capacity to appreciate risk. Further, it may be important not to divorce the case from its context, which may include peer pressure and the belief that the bullying may intensify if there is complaint or may subside if nothing is done (cf *New South Wales v Griffin* [2004] NSWCA 17). There may be an additional fear that parents or teachers who do not properly understand but who mean well might react by removing the target's own cherished access to the technology, in effect punishing the target himself or herself being bullied!

Conclusion

The misuse of technology to inflict psychological harm poses a further challenge to schools already confronted by traditional forms of bullying and for the law when called upon to determine claims for compensation against schools alleged to have breached their duty of care failing to take steps to prevent such cyber bullying. In relation to some issues such as whether in the circumstances it was reasonably foreseeable that a child of "normal fortitude" would have suffered a psychiatric injury, the relevant cause of the psychiatric injury and the expected response of a "reasonable child" to protect himself or herself against such aggression, the law is likely to call upon the expert evidence of the consulting psychologist/psychiatrist. This may pose a significant challenge too for such a psychologist/psychiatrist, who may be asked questions in terms of legally-constructed limits on liability which may bear little if any resemblance to concepts associated with diagnosis, prognosis and treatment with which they may be more familiar.

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